

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

SHAVONDA BAILEY, *as Next Friend of* §  
K.A., and P.A.; and VIVIAN LAMPKINS, §  
*as Next Friend of J.L.* §

VS. §

5:13-CV-00700-FB

CITY OF SAN ANTONIO, TEXAS; §  
OFFICER PRESTON, *Individually*; §  
VIDAL DIAZ, *Individually*; §  
MICHAEL FLETCHER, *Individually*; §  
FRANCISCO GALVAN, *Individually*; §  
MATTHEW FLORES, *Individually*; §  
AUBREY PLAUCHE, *Individually*; §  
MATTHEW QUINTANILLA, §  
*Individually*; ROBERT TAMEZ, §  
*Individually*; and PAUL TRIGO, §  
*Individually* §

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**APPENDIX TO DEFENDANTS FRANCISCO GALVAN, NATHAN PRESTON,  
MICHAEL FLETCHER, MATTHEW FLORES, MATTHEW QUINTANILLA, ROBERT  
TAMEZ, VIDAL DIAZ, PAUL TRIGO, AND AUBREY PLAUCHE'S  
MOTION FOR SUMMARY JUDGMENT**

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**I.**

**STATEMENT OF EXHIBITS**

In support of Defendants' Motion for Summary Judgment, Defendants have attached hereto and incorporated herein for all purposes, the following summary judgment evidence:

Exhibit "A" Video/Audio taken from Detective Nathan Preston's patrol vehicle of the pursuit and of the scene in the 10800 block of Deepwater Bay:

Exhibit "B" Affidavit of Detective Nathan Preston;

Exhibit "C" Deposition excerpts of Gary Hovermale;

Exhibit "D" Affidavit of Lt. Chris Benavides, with the written statements of Francisco Galvan, Nathan Preston, Michael Fletcher, Matthew Flores, Matthew

Quintanilla, Robert Tamez, Paul Trigo, Vidal Diaz, Aubrey Plauche and Gary Hovermale;

Exhibit “E” Affidavit and Curriculum Vitae of Albert Ortiz;

Exhibit “F” Affidavit and Curriculum Vitae of Dr. Vincent DiMaio;

Exhibit “G” Bexar County Medical Examiner’s records; and,

Exhibit “H” Affidavit and Curriculum Vitae of J. Rod McCutcheon;

### **FACTUAL BACKGROUND**

#### **Plaintiffs’ Version**

Plaintiffs claim that in the early morning hours of August 4, 2011 Pierre Abernathy (hereinafter “Abernathy”), a paranoid schizophrenic, was going to pick up his fiancé from work.<sup>1</sup> He noticed some San Antonio Police officers following him so he drove to his mother’s house, pulled into his mother’s driveway, and exited his vehicle.<sup>2</sup> At this point the Defendant officers chased Abernathy around the front yards of his mother’s and neighbors’ homes and began Tasing him.<sup>3</sup> Plaintiffs claim at one point Abernathy was in his neighbor’s front yard and while Defendants had him in custody with his hands cuffed behind his back they released a K-9 dog who bit and mauled Abernathy as his mother, family, and neighbors watched in horror.<sup>4</sup> The Defendants then began to savagely beat Abernathy, while he lay there defenseless in a fetal position.<sup>5</sup> Plaintiffs claim as the Defendants were beating Abernathy, the Defendants were boasting and bragging, encouraging each other saying “yeah get some, yeah get some” while Abernathy lay motionless.<sup>6</sup> Defendants continued beating Abernathy as if he were a “piñata” using their fists and batons as well as Tasing him as the K-9 dog mauled him like his “favorite

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<sup>1</sup> Docket #36, p. 5.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Docket #36, p. 6.

dog treat”.<sup>7</sup> Plaintiffs add that at no time during the incident was Abernathy violent and that Abernathy did not resist the officers’ requests.<sup>8</sup> Instead the Defendants committed these acts maliciously, intentionally, and sadistically for the very purpose of punishing and causing injury and/or death to Abernathy.<sup>9</sup>

### **Defendants’ Version**

According to the Defendants, on August 4, 2011, Officer Francisco Galvan (“Galvan”) was working in the DWI STEP program, in full police uniform, and driving an unmarked patrol vehicle with emergency lights mounted in the grill of the car, the dash, and the back window.<sup>10</sup> Galvan witnessed a black Ford Explorer being driven by an individual, later identified as Abernathy, going the wrong way on La Cantera Parkway, driving east in the west bound lane.<sup>11</sup> Galvan noticed another vehicle traveling in the proper direction had to stop to avoid being struck by Abernathy.<sup>12</sup> Galvan activated his lights and siren but Abernathy refused to stop.<sup>13</sup> Galvan could see Abernathy looking at him through the driver’s side mirror while Abernathy talked on his cell phone.<sup>14</sup> After driving through some business parking lots Abernathy got on the access road going toward Loop 1604.<sup>15</sup> Throughout this time Galvan observed Abernathy commit numerous traffic violations.<sup>16</sup> Galvan’s partner, Detective Michael Fletcher (“Fletcher”), joined the pursuit and became the second vehicle in the pursuit.<sup>17</sup> Abernathy eventually drove onto IH-

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Exhibit “D”, p. D-1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Exhibit “D”, p. D-2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Exhibit “D”, p. D-9.

10 heading east toward the exit to 410 West.<sup>18</sup> At this point Officer Nathan Preston (“Preston”) was given permission by the pursuit supervisor to take the lead in the pursuit because Preston’s vehicle was equipped with a dash cam video.<sup>19</sup> Preston used his vehicle’s P.A. system to order Abernathy to pull over several times during the pursuit, but Abernathy refused to stop and led the officers to a house in a cul-de-sac on Deepwater Bay.<sup>20</sup> The pursuit lasted approximately 14.4 miles.<sup>21</sup>

Abernathy stopped his car part way in a driveway, with the rear of the vehicle still in the street.<sup>22</sup> Preston pulled straight into the cul-de-sac, stopping his patrol vehicle behind Abernathy’s vehicle and angled in a position to allow him to quickly get out of his vehicle to attempt to subdue Abernathy if he ran.<sup>23</sup> Preston could see Abernathy moving around in his vehicle and, due to the information he heard on the radio earlier, he was afraid Abernathy was going to bail out and maybe run toward one of the houses in the cul-de-sac.<sup>24</sup> Preston quickly exited his vehicle and approached the driver’s side of his vehicle.<sup>25</sup> Galvan parked behind Abernathy’s vehicle, exited his vehicle and ran up to the driver’s side of Abernathy’s vehicle with his TASER drawn.<sup>26</sup> Galvan saw that Abernathy was about 6’2” and roughly 250 pounds, mostly muscle.<sup>27</sup> After Abernathy got out of his car, Preston got ahold of Abernathy’s right arm and handcuffed his right wrist.<sup>28</sup> Galvan holstered his TASER.<sup>29</sup> Abernathy then pulled his right

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<sup>18</sup> Exhibit “D”, p. D-2.

<sup>19</sup> Exhibit “B”, p. 2; see also Exhibit “D”, p. D-5.

<sup>20</sup> Exhibit “B”, p. 2; see also Exhibit “D”, pp. D-3 and D-6.

<sup>21</sup> Exhibit “B”, p. 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Exhibit “D”, p. D-3.

<sup>27</sup> *Id.*

<sup>28</sup> Exhibit “B”, p. 2.

<sup>29</sup> Exhibit “D”, p. D-3.

arm to his chest so Galvan again took out his TASER.<sup>30</sup> Officer Paul Trigo (“Trigo”) noticed the officers were having trouble getting Abernathy handcuffed so he assisted the officers by placing his hands on Abernathy’s back to try to pin him down.<sup>31</sup> However, the three officers were unable to control Abernathy.<sup>32</sup> Abernathy was able to standup, causing Galvan to TASER Abernathy’s center mass, but with no effect.<sup>33</sup> Galvan fired his TASER a second time, again with no affect on Abernathy.<sup>34</sup> Preston was contacted by the TASER wires and shocked.<sup>35</sup> Abernathy started running with the TASER wires still attached to him and Preston’s handcuff dangling off his right wrist, while yelling, “Momma! Momma!”<sup>36</sup> Abernathy ran to what was later determined to be his mother’s house, and tried to get inside through a glass storm door.<sup>37</sup> Fletcher reached him and grabbed him in a bear hug,<sup>38</sup> at which point fell into the glass door, causing it to shatter.<sup>39</sup> Trigo joined the struggle and struck Abernathy with his baton, also accidentally striking Fletcher’s left hand.<sup>40</sup> The injury caused Fletcher to back out of the fight.<sup>41</sup> Preston reached the struggle and used his TASER on Abernathy.<sup>42</sup> Abernathy stopped for a second but then ran to the house next door and tried to get in.<sup>43</sup> At some point Trigo struck Abernathy again with his baton, again with no effect.<sup>44</sup> Preston TASERED Abernathy a second time.<sup>45</sup> Abernathy went to his knees for two or three seconds and then ran back toward his

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<sup>30</sup> Exhibit “D”, p. D-3.

<sup>31</sup> Exhibit “D”, p. D-20.

<sup>32</sup> *Id.*

<sup>33</sup> Exhibit “D”, p. D-3.

<sup>34</sup> *Id.*

<sup>35</sup> Exhibit “B” p. 3.

<sup>36</sup> Exhibit “D”, p. D-3.

<sup>37</sup> *Id.*

<sup>38</sup> Exhibit “D”, p. D-10.

<sup>39</sup> *Id.*

<sup>40</sup> Exhibit “D”, pp. D-11, D-20.

<sup>41</sup> Exhibit “D”, p. D-11

<sup>42</sup> Exhibit “B”, p. 3.

<sup>43</sup> *Id.*

<sup>44</sup> Exhibit “D”, p. D-20.

<sup>45</sup> Exhibit “B”, p. 3.

mother's house.<sup>46</sup> Abernathy continued to struggle with officers, broke free, and began running down the street.<sup>47</sup> K9 Officer Aubrey Plauche ("Plauche") then deployed his dog.<sup>48</sup> The dog latched onto Abernathy's buttock but Abernathy continued to run with the dog latched onto him to a house two doors from his mother's house.<sup>49</sup> Plauche held on to the dog's leash.<sup>50</sup>

Preston again caught up with Abernathy and tackled him into some bushes.<sup>51</sup> This took place in the front yard of homeowner, Gary Hovermale, a retired air force veteran.<sup>52</sup> Preston tried to gain control of Abernathy's right arm but Abernathy pushed up with his left arm and pulled his right arm toward his chest.<sup>53</sup> Preston was physically winded from the struggle with Abernathy, had received a Taser shock, and was afraid Abernathy would use the dangling handcuff as a weapon so he hit him with a closed fist in the head area to gain control of him.<sup>54</sup> Abernathy continued to fight with the officers and refused to be handcuffed.<sup>55</sup> Galvan hit Abernathy in his back and stomach to get Abernathy to stop fighting.<sup>56</sup> Trigo grabbed the handcuff dangling from Abernathy's right wrist as Abernathy continued to struggle.<sup>57</sup> Trigo struck Abernathy in the rib cage with no effect.<sup>58</sup> Officer Matthew Quintanilla ("Quintanilla") then grabbed Abernathy's right hand.<sup>59</sup> Trigo, who by now was becoming exhausted, stood up and kicked Abernathy in the thigh to try and stun him and get him to stop fighting.<sup>60</sup> Officer Robert Tamez then grabbed ahold of Abernathy's right hand as Quintanilla grabbed Abernathy's

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<sup>46</sup> *Id.*

<sup>47</sup> Exhibit "D", p. D-3.

<sup>48</sup> Exhibit "D", p. D-25.

<sup>49</sup> *Id.*

<sup>50</sup> Exhibit "D", p. D-25.

<sup>51</sup> Exhibit "B", p. 3.

<sup>52</sup> Exhibit "D", p. D-27.

<sup>53</sup> Exhibit "B", p. 3.

<sup>54</sup> *Id.*

<sup>55</sup> Exhibit "D", p. D-4.

<sup>56</sup> *Id.*

<sup>57</sup> Exhibit "D", p. D-21.

<sup>58</sup> *Id.*

<sup>59</sup> Exhibit "D", p. D-15.

<sup>60</sup> Exhibit "D", p. D-1.

leg in an attempt to flip him over.<sup>61</sup> Quintanilla was able to put his knee on top of Abernathy's leg.<sup>62</sup> Abernathy grabbed ahold of Tamez' leg and started moving up toward his holster.<sup>63</sup> Tamez struck Abernathy twice in the face and Abernathy released Tamez' leg.<sup>64</sup> At this point, in order to try to end the prolonged struggle, Officer Matthew Flores tasered Abernathy which caused Abernathy to relax his arm.<sup>65</sup> As an officer brought Abernathy's left arm back it caused a TASER wire to lose contact, at which point Abernathy started to pull his arm back.<sup>66</sup> Flores tried to use his TASER again but it wasn't working due to the loose connection.<sup>67</sup> At that point Abernathy kicked his feet and knocked Quintanilla off of him.<sup>68</sup> As Abernathy was on the ground and other officers were controlling his upper body, Preston slid down and controlled his legs to prevent him from pushing up off the ground again.<sup>69</sup> Officer Vidal Diaz ("Diaz") was able to get Abernathy's left arm behind his back and Abernathy was finally handcuffed.<sup>70</sup>

Hovermale recalled seeing four to six police officers wrestling with Abernathy in his flower bed.<sup>71</sup> Hovermale heard the officers order Abernathy to put his arms behind his back but they were having a difficult time trying to restrain him.<sup>72</sup> This went on for three to four minutes.<sup>73</sup> It appeared to Hovermale that Abernathy was resisting arrest.<sup>74</sup> The activity was such that quite a bit of plants in his flower bed were torn up as well as the hedge.<sup>75</sup> Hovermale saw several officers trying to get Abernathy's arms behind his back but they were having a hard

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<sup>61</sup> Exhibit "D", pp. D-16, D-17.

<sup>62</sup> Exhibit "D", p. D-16.

<sup>63</sup> Exhibit "D", p. D-17.

<sup>64</sup> Exhibit "D", pp. D-17 and D-18.

<sup>65</sup> Exhibit "D", pp. D-13 and D-14.

<sup>66</sup> Exhibit "D", p. D-16.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Exhibit "B", p. 4.

<sup>70</sup> Exhibit "D", p. D-23.

<sup>71</sup> Exhibit "C", pp. 57, 58.

<sup>72</sup> Exhibit "C", p. 13.

<sup>73</sup> *Id.*

<sup>74</sup> Exhibit "C", p. 59.

<sup>75</sup> Exhibit "C", p. 58.

time restraining him.<sup>76</sup> Once Abernathy was handcuffed the police activity stopped.<sup>77</sup> Hovermale denies hearing anything inappropriate being said by the officers.<sup>78</sup>

Preston or another officer called for EMS as soon as the struggle ended.<sup>79</sup> According to the Bexar County Medical Examiner's Record, the autopsy report revealed that "Pierre Towell Abernathy, a 30 year old male, died as a result of the combined effects of intoxication with cocaine, a prolonged struggle, and a cardiomyopathy (an enlarged heart)."<sup>80</sup>

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<sup>76</sup> Exhibit "C", p. 59.

<sup>77</sup> Exhibit "C", p. 19.

<sup>78</sup> Exhibit "C", p. 22.

<sup>79</sup> Exhibit "D", p. D-8.

<sup>80</sup> Exhibit "G", p. 38.